MOTION FILED
JUL 16 1998

(10)

No. 97-475

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,
*Petitioner,*
v.
TSUI YUAN TSENG,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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The Air Transport Association of America (ATA) respectfully moves to file the attached brief *amicus curiae* in support of the petition to reverse the judgment of the U.S. Court of Appeals for the Second Circuit. Counsel for Petitioner has given their consent for the ATA to file this brief, and verification of that consent has been filed with the Court. The consent of Counsel for Respondent was requested and refused despite being granted at the petition stage. This Court previously granted the ATA's motion for leave to file a Brief as *amicus curiae*. 118 S. Ct. 1793 (May 18, 1998).

The interest of the ATA in this case stems from the fact that its member airlines consider this case to present issues of national and international importance. As set forth more fully in the attached brief, the decision below undermines the continued viability of the Warsaw Convention and profoundly affects the ability of the ATA's members to implement security measures that assure the safety of 50 million passengers carried annually on international flights by the ATA member airlines.

Respectfully submitted,

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## QUESTION PRESENTED

Whether the Warsaw Convention, a treaty of the United States, exclusively governs and precludes any recovery for a passenger's injuries sustained in the course of "international transportation" if the injuries were not caused by an "accident" within the meaning of Article 17 of the Convention?

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The Air Transport Association of America (ATA), as *amicus curiae*, supports the Petition of El Al Israel Airlines, Ltd. (El Al) to reverse the judgment of the U.S. Court of Appeals for the Second Circuit.[1]

## INTEREST OF THE AIR TRANSPORT ASSOCIATION OF AMERICA

The ATA is an association of 23 U.S. and five foreign airlines.[2] The ATA's U.S. members operate within the

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[1] No party to this case had any role in drafting this brief or provided any monetary support for its preparation or filing. Supreme Court Rule 37.6.

[2] The ATA's members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, Ameri-

United States and in the U.S. foreign commerce. Its foreign members also participate in the U.S. foreign commerce and are subject to suit in the United States. The ATA's principal purpose is to support its member airlines by promoting airline safety and advocating common industry positions. Since its inception in 1936, the ATA has been involved in the development of international law governing international air transportation.

The decision below threatens to upset the established expectations of airlines and their governments with respect to the uniformity and exclusivity of the international air transportation liability regime.

First, the ATA is concerned that the decision below puts the primacy of the Warsaw Convention's liability regime at risk by undermining the realization of its principal objective—uniformity. The decision threatens to subject passengers and airlines to different remedies and standards of liability, depending on the country or the local jurisdiction in which the suit is filed. Further, the decision contradicts the uniform implementation of the Convention's rules by airlines and their governments. Recently, the world's airlines, with strong U.S. government support, have achieved consensus to waive the Convention's passenger liability limits and certain of its defenses. ATA member airlines have already implemented waivers of passenger liability limits in their tariffs governing international air services. The decision below threatens the further implementation by foreign airlines of this important consensus.

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can Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. The ATA's technical, foreign-flag members are Aeromexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana Airlines.

Finally, by exposing airlines to liability under local law for applying statutorily required security procedures, the court's holding could have a chilling effect on airlines and their personnel in executing their security responsibilities. This would impair the ability of the United States to protect the safety and security of its citizens.

## STATEMENT

Respondent seeks damages under New York state law for emotional injuries allegedly suffered during a routine airline security search conducted in the United States pursuant to El Al's security program. Respondent suffered no physical harm. El Al conducted the search in accordance with a security program to screen all passengers and baggage before boarding or loading.

The district court concluded that Respondent's injuries were caused by an "accident" within the meaning of Article 17 of the Warsaw Convention.[3] The district court found, however, that the injuries were not "bodily injuries" cognizable under Article 17 and that Article 24 of the Convention[4] precluded state law claims for injuries not compensable under Article 17.

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[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 note (1994). Article 17 of the Convention states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[4] Article 24 of the Convention states:

> (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the

The court of appeals reversed, holding that a security search—being a common incident of international air travel, and not an "unexpected" or "unusual" event—is not an "accident" for purposes of the Warsaw Convention. Finding the conduct not "covered" by Article 17, the court of appeals held that Article 24 did not preempt the personal injury claims and that Respondent could pursue causes of action under state law unfettered by the Convention's liability limitations.

## SUMMARY OF ARGUMENT

The parties to the Warsaw Convention intended to establish and maintain a uniform set of rules governing the liability of the carrier to passengers traveling in international air transportation. Nothing in this Convention's long history supports a different interpretation. The decision below directly disrupts the international airline industry's and the aeronautical authorities of governments' expectations that the Convention provides the exclusive means of passenger redress for injuries within its scope.

Subsequent amendments to the Convention confirm its objective of establishing an exclusive and uniform set of carrier liability rules for passengers in international air transportation. The Convention itself, which allows parties adhering to different versions of this treaty to nonetheless maintain a treaty relationship, underscores the need for consistency in its interpretation except where the parties clearly intend to effect a change in their obligations. In this case, it is inconceivable that the parties would seek to alter something so fundamental as the scope of the Convention's uniformity by a mere technical clarification to the language of Article 24.

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questions as to who are the persons who have the right to bring suit and what are their respective rights.

The holding of the court below contradicts the carriers' own rules implementing the Convention, as filed with the Department of Transportation (DOT) in tariffs. It also jeopardizes the consensus recently achieved by the major international air carriers to waive the Convention's passenger liability limits and certain defenses.

Declaring certain causes of action for injuries sustained in international air transportation to be outside the Convention's coverage would have serious adverse effects. It would disrupt the Convention's uniform liability regime and would interfere with airline activity undertaken pursuant to other international obligations governing international air transportation security—obligations negotiated with the shared expectation of the Convention's exclusivity.

The court of appeals' holding that the Warsaw Convention does not apply to certain passenger injury claims sustained during international air transportation is based upon the fundamentally erroneous premise that a Convention establishing exclusive liability rules cannot be read to preclude liability altogether in certain cases.

Finally, the court of appeals' decision directly conflicts with the decision of the U.K. House of Lords of the United Kingdom in *Abnett v. British Airways*.[5] The decision of a sister signatory to the Convention is entitled to considerable weight.[6]

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[5] 1 All E.R. 193 (H.L. 1996) (U.K.); Pet. App. 34a-65a.

[6] *Air France v. Saks*, 470 U.S. 392, 404 (1985).

## ARGUMENT

### I. THE HOLDING OF THE COURT OF APPEALS THAT THE WARSAW CONVENTION'S RULES ARE NOT EXCLUSIVE UNDERMINES THE UNIFORM LIABILITY REGIME OF THE CONVENTION.

In this case, the court of appeals held that the Warsaw Convention does not provide the exclusive remedy for personal injuries sustained in the course of international air transportation. Thus, according to the court of appeals, plaintiffs who allegedly suffer personal injuries, not involving physical harm, resulting from an airline's security search—a search mandated by both federal and international law—are free to sue under the law of any state unfettered by the liability rules agreed to by the United States in the Warsaw Convention.

The court of appeals' holding does substantial damage to the Convention and the uniform liability regime established under it. A principal purpose of the Warsaw Convention is to establish a system for "regulating in a uniform manner the conditions of international transportation by air in respect of . . . the liability of the carrier." [7] Accordingly, Article 1(1), which broadly defines the Convention's scope, provides that "[t]his Convention shall apply to *all* international transportation of persons, baggage, or goods performed by aircraft for hire." [8] In other words, the Convention's liability rules are exclusive for claims arising from "international air transportation" as defined in the Convention.

The court of appeals' decision ignores these fundamental principles. As set forth in the Brief of the United States as *amicus curiae*, the governing text, drafting history, and

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[7] Warsaw Convention, Preamble; *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 116 S. Ct. 629, 636 (1996).

[8] Warsaw Convention, Article 1(1) (emphasis added).

overall structure of the Convention confirm the exclusivity of the Convention.[9] The ATA will not address those issues further in this brief. Rather, because subsequent conduct of the Convention's parties and international airlines is relevant to the Convention's proper interpretation, the ATA will here set forth the developments following its ratification that further demonstrate its exclusivity. This brief will also discuss the serious practical implications that the court of appeals' decision will have on the Convention's liability regime, airlines, and the safety and security of airline passengers.

## II. SUBSEQUENT AMENDMENTS TO THE CONVENTION CONFIRM THE EXCLUSIVITY OF ITS RULES.

In holding that the Convention does not provide the exclusive remedy for personal injuries sustained during international air transportation, the court of appeals focused on the language of Article 24, which provides "[i]n cases covered by Article 17" [10] an action for damages based on personal injury "can only be brought subject to the conditions and limits set out in this convention." [11] The court then reasoned that for a person to recover under Article 17, his or her personal injuries resulting from an "accident" must lead to bodily injury; any injuries that are neither bodily injuries nor caused by an "accident" are not "covered" by Article 17.[12] The court then concluded that because such injuries are not "covered" by Article 17, Article 24 does not apply, and a person sus-

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[9] Brief for the United States as *Amicus Curiae* on Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit at 13-19 (April 1998).

[10] Warsaw Convention, Article 24(2).

[11] *Id.*, Article 24(1).

[12] Pet. App. 15a-16a.

taining such injuries is free to seek whatever remedies are provided by municipal law.[13]

The Convention's amendments show that the court of appeals' reading of Article 24's exclusivity provisions does not conform with the "shared expectations of the contracting parties." [14] The 1971 Guatemala City Protocol to the Convention proposed to amend Articles 17, 22, 24, and 25 of the Convention to make the liability of the carrier absolute and its limits unbreakable.[15] Of particular relevance here, this Protocol proposed to amend the coverage of Article 24's exclusivity provision from cases "covered by Article 17" to provide for exclusivity with respect to "any action for damages, however founded" arising from "the carriage of passengers and baggage." [16] This change in language, however, was not intended as a substantive

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[13] *Id.*

[14] *Air France v. Saks*, 470 U.S. at 399.

[15] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, March 8, 1971. *See* R. Mankewitz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. COM. 519 (1972). The ATA recognizes that this Court has cautioned against attaching significance to the Guatemala City Protocol. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991). As explained *infra* nn.24-26 and accompanying text, however, Montreal Protocol No. 4's recent entry into force makes it relevant.

[16] Article IX of the Guatemala City Protocol would have amended Article 24(2) of the Convention to read:

> In the carriage of passengers and baggage any action for damages, however founded, whether under this convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights . . . .

change in the Convention's coverage, but rather as a reorganization of Article 24's paragraphs.[17]

Although it never entered into force,[18] the Guatemala City Protocol has been incorporated into Montreal Protocols Nos. 3 [19] and 4.[20] In particular, Montreal Protocol No. 3 (which deals primarily with passenger liability) would have amended Article 24, using the identical language contained in Article IX of the Guatemala City Protocol. Montreal Protocol No. 4 (which deals primarily with cargo liability) nonetheless amends the language of Article 24 with language derived from the Guatemala City Protocol. As with the Guatemala City Protocol, there is no suggestion in the negotiating history with respect to the Montreal Protocols that this was intended to effect a substantive change in the Convention's exclusivity. Indeed, the negotiating history of Montreal Protocol No 4

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[17] ICAO, INTERNATIONAL CONFERENCE ON AIR LAW, GUATEMALA CITY, ICAO Doc. 9040-LC/167-1, at 301 (1972).

[18] For the Protocol to enter into force and become binding, it must be approved by 30 signatories to the Convention, which represent at least 40 percent of the total international scheduled air traffic. *See* Article XX. The Protocol has never been transmitted to the United States Senate for its advice and consent to ratification. Its status in the United States and the international community is largely irrelevant in light of Montreal Protocol Nos. 3 and 4.

[19] Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971, Art. VII, September 25, 1975.

[20] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, September 25, 1975.

suggests that this change was uncontroversial since it was approved unanimously.[21]

In 1977, the Montreal Protocols were submitted to the Senate for advice and consent to ratification. They were favorably reported to the Senate by the Senate Foreign Relations Committee on three separate occasions.[22] In so reporting the committee confirmed that, with respect to the Convention's exclusivity, the amendment to Article 24's language was intended to clarify the existing provision, stating that Article 24 "makes clear that actions for damages whether founded upon the 'Convention, or in contract or tort or otherwise' can only be brought subject to the conditions and limits set out in the Convention." [23]

On June 14, 1998, Montreal Protocol No. 4 entered into force for the 30 countries that had ratified it.[24] For those countries Article 24, as it relates to passenger claims, reads as follows:

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21 ICAO, INTERNATIONAL CONFERENCE ON AIR LAW, MONTREAL, ICAO Doc. 9154-LC/174-1, at 167 (1975).

22 The Senate's failure to give its advice and consent to ratification of both Protocols was attributable primarily to "a reluctance to accept any damage limitations [on passenger claims] at all." *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1475 n.19 (11th Cir. 1989), *cert. granted*, 496 U.S. 904 (1990), *rev'd on other grounds*, 499 U.S. 530 (1991); *see also* S. REP. No. 101-21, at 21 (Minority views of Senators Biden and Simon). On June 23, 1998, the Senate Foreign Relations Committee voted unanimously to report Montreal Protocol No. 4 favorably for Senate advice and consent to ratification. *See* 144 CONG. REC. D685 (daily ed. June 23, 1998). The committee has not yet issued a report to accompany its recommendation. The Senate is expected to direct the Secretary of the Senate to return Montreal Additional Protocol No. 3 to the President.

23 S. REP. No. 97-45, at 12 (1981); S. REP. No. 98-1, Executive B, at 17 (1983); S. REP. No. 101-21, at 15 (1990).

24 The treaty entered into force 30 days after the thirtieth signatory deposited its instrument of ratification with the Polish government under Article XVIII.

> In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.[25]

Notwithstanding the differences in the texts of Article 24, the United States remains in a treaty relationship under the Convention with all 30 countries party to Montreal Protocol No. 4.[26] A holding that the changes to Article 24 are more than a drafting clarification would result in vastly different liability rules being applied to passengers on a single flight: the rules depending on the country in which an action for damages is filed. Such a result would eviscerate the Convention's uniformity and therefore should be embraced only where the parties clearly intended such a result. That is not the case here.

## III. THE AIRLINES AND THE UNITED STATES HAVE IMPLEMENTED THE CONVENTION'S RULES IN A MANNER CONSISTENT WITH THEIR EXCLUSIVITY.

### A. Air Carrier Tariffs Filed with the Department of Transportation Reflect the Exclusivity of the Convention's Rules.

Under the terms of the Chicago Convention, scheduled international air transport services require the mutual con-

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[25] Once the United States ratifies Montreal Protocol No. 4, the amended Article 24 will govern actions in the United States arising from the injury to, or the death of, a passenger in international carriage, provided that the carriage involves a place of departure and destination within the territory of a party to the amended Convention. *See* Montreal Protocol No. 4, Article XIV. Hence, a round trip ticket originating in the United States will be governed by the amended Article 24 after Montreal Protocol No. 4 is ratified by the United States. *See, e.g., Swaminathan v. Swiss Air Transport Co.*, 962 F.2d 387, 389 (5th Cir. 1992).

[26] *In re Korean Air Lines Disaster*, 664 F. Supp. 1463, 1469 (D.D.C. 1985).

sent of the nations between whose territories passengers are carried.[27] For this reason among others, international air transportation is subject to pervasive economic and safety regulations, the terms of which are governed by bilateral air services agreements.[28]

U.S. law authorizes DOT to require that tariffs contain the contract of carriage.[29] DOT regulations require that, unless a carrier elects to assume unlimited liability, its tariffs must contain a statement as to the applicability and effect of the Warsaw Convention.[30]

Carrier tariffs typically contain two sets of liability rules: one for international transportation as defined in Article 1(2) of the Warsaw Convention, and another for international transportation that does not fit that definition.[31] With respect to international transportation as defined in the Convention, DOT requires carriers serving the United States to include a waiver of the Convention's $10,000 passenger liability limit, by becoming a party either to (a) the 1966 Montreal Agreement, under which the carrier agrees to waive the limit and the defense of non-negligence up to $75,000,[32] or (b) one of the 1996 inter-

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[27] Convention on International Civil Aviation, December 7, 1944, art. 6, 61 Stat. 1180, 1182, 15 U.N.T.S. 295.

[28] *See, e.g.*, Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, July 23, 1977, 28 U.S.T. 5367, TIAS 7537.

[29] 49 U.S.C. § 41504(a)(1)(A).

[30] 14 C.F.R. § 221.38(j).

[31] An example of international air transportation that does not fit within the Convention's definition of that term is transportation between countries that are not party to the Convention.

[32] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, CAB Agreement 18900, 31 Fed. Reg. 7302 (1966) (approved by Civil Aeronautics Board (CAB) Order No. E-23680, May 13, 1966). *See, e.g.*, 14 C.F.R. Part 203.

carrier agreements [33] under which the carrier agrees to waive the liability limit altogether, while retaining the defense of non-negligence with respect to that portion of the claim that does not exceed 100,000 Special Drawing Rights (SDRs).[34]

The 1966 Montreal Agreement, which has been included in carriers' tariffs for over 30 years, is predicated on the Convention's exclusivity. The Montreal Agreement (which was approved by the CAB) specifically states that it is to apply "to all international transportation by the Carrier as defined in the said Convention." [35] Pursuant to the CAB's rulemaking authority,[36] the terms of this agreement were incorporated into the regulations since they were consistent with the Warsaw Convention. The regulations require carriers to file their adherence to the Montreal Agreement as part of their tariffs.[37]

Pursuant to long-standing industry practice, U.S. and foreign carriers harmonize their conditions of carriage, particularly with regard to liability, to promote interlining and other joint service arrangements. Conditions of carriage governing liability are based on Recommended Practice 1724 of the International Air Transport Association

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[33] These new agreements are known as the Intercarrier Agreement on Passenger Liability (IIA), Agreement on Measures to Implement the IATA Intercarrier (MIA), and the U.S.-carrier adopted "Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs" (IPA). *See* Department of Transportation Order 97-1-2, 1997 DOT Av. LEXIS 2 (D.O.T. Jan. 8, 1997). *See infra* pp. 16-17.

[34] Special Drawing Rights of the International Monetary Fund are based on exchange rates for U.S., German, British, French, and Japanese currencies. On July 6, one SDR equaled about U.S. $1.33. WALL ST. J., July 7, 1998, at C25.

[35] *See* n.32.

[36] *See, e.g., Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973).

[37] 14 C.F.R. § 203.4.

(IATA). Section 16.1 of that resolution governs international carriage, and assumes the exclusivity of the Convention's liability regime by providing that such carriage "is subject to the rules and limitations relating to liability established by the Convention unless such carriage is not international carriage to which the Convention applies." In contrast, with respect to such extra-Convention carriage, section 16.2 of IATA's Recommended Practice 1724 provides that the carrier shall be liable for damage to a passenger "only if such damage has been caused by the negligence of Carrier." Under this provision, state negligence law would apply.

ATA member airline tariffs generally incorporate the IATA language. For example, Rule 55 of Delta Air Lines' DOT-approved tariff provides:

> (B) *LAWS AND PROVISIONS APPLICABLE*
>
> (1) Warsaw Convention. The Carrier agrees in accordance with Article 22(1) of [the Warsaw Convention] that, *as to all international carriage or transportation hereunder as defined in the Convention:*
>
> (a) The Carrier shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.
>
> (b) The Carrier shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 [SDRs].
>
> (c) Except as otherwise provided under paragraph (a) and (b) hereof, the Carrier reserves all defenses available under the Convention to such claims. With respect to third parties, the Carrier reserves all rights

of recourse against any other person, including without limitation, rights of contribution and indemnity.

(d) The Carrier agrees that subject to applicable law recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

. . . .

(C) *LIMITATION OF LIABILITY*

Except as the Convention or other applicable law may otherwise require:

(1) Carrier is not liable for any death, injury, delay, loss, or other damage of whatsoever nature . . . to passengers or unchecked baggage arising out of or in connection with carriage or other services performed by carrier incidental thereto, *unless such damage is caused by the negligence of carrier.*[38]

To the ATA's knowledge, no tariff on file at DOT contemplates that international air transportation as defined by the Convention would be subject to any liability rules other than those prescribed or permitted by the Convention. This is significant because once DOT has accepted a carrier's tariff and permitted it to go into effect, it has the force of law.[39] This Court recently reaffirmed this doctrine, known as the "filed rate doctrine" in *Maislin Industries v. Primary Steel.*[40] A carrier may not deviate

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[38] International Passenger Rules and Fares Tariff No. DL-1, NTA(A) No. 304, ¶ C.A.B. No. 459, Rules 55 B(1) and (C), effective Feb. 6, 1997 (footnotes omitted, emphasis added). Filed with DOT permission granted in Order 97-1-2. The language of paragraphs B(1)(a)-(d) is taken from the IPA (*see supra* n.33).

[39] *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *St. Paul Ins. Co. v. Venezuelan Int'l Airways, Inc.*, 807 F.2d 1543, 1548 (11th Cir. 1987).

[40] 497 U.S. 116, 126 (1990); *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922).

from a filed and effective tariff for foreign air transportation under any pretext.[41] The filed rate doctrine applies to air transportation.[42]

### B. Recent Waivers of the Convention's Passenger Liability Limits Were Achieved on the Basis of the Industry's Expectations That the Convention's Rules Are Exclusive.

In 1995 the world's major international airlines, acting under the auspices of the ATA and IATA, achieved a consensus to waive the Convention's passenger liability limit and certain defenses.[43] This major milestone was achieved by the aviation industry, U.S. and foreign governments, and groups representing the survivors of those who have perished in airline accidents, working together to develop intercarrier agreements. Many airlines have implemented the intercarrier agreements by revising their tariffs and conditions of carriage and terminating their participation in the 1966 Montreal Agreements. Other airlines are taking comparable action. Under the new regime, U.S. and foreign airlines agree to:

1) waive the Convention's liability limit for death of, or bodily injury to, passengers;

2) waive the defense of non-negligence for claims up to 100,000 [SDRs]; and

3) preserve all other defenses and rights available under the Convention, including any rights of indemnity and contribution.

DOT has approved these intercarrier agreements.[44]

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[41] 49 U.S.C. § 41510 (1998); *accord, Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915).

[42] *Tishman & Lipp, Inc. v. Delta Air Lines*, 413 F.2d 1401, 1403 (2d Cir. 1969); *North Am. Phillips Corp. v. Emery Air Freight*, 579 F.2d 229, 233 (2d Cir. 1978).

[43] Article 22(1) of the Warsaw Convention authorizes airlines to agree to additional liabilities by "special contract."

[44] *See* Order 97-1-2.

The consensus among the airlines, both foreign- and U.S.-flag, was achieved with the common understanding that the Warsaw Convention provided the exclusive remedy for all injury and death incurred during international air transportation. Indeed, the new regime's principal purpose is to secure for U.S. citizens, including the victims of terrorists' attacks, the benefit of a uniform and efficient system providing prompt and adequate compensation for injury or death in international air transportation regardless of the country in which the lawsuit is brought. In general, the new regime's benefits are substantially more favorable than the remedies available under the law of many nations.

### C. The Court of Appeals' Decision, If Not Reversed, Will Have Deleterious Effects on Passengers.

As shown, nothing in the Convention, the intercarrier agreements, the tariffs filed with DOT that rely on the Convention, or any other source suggests that the Convention contemplates application of any liability rules other than those it prescribes. The decision below threatens to take away the benefits conferred by the Convention, the intercarrier agreements based thereon, and the tariffs filed with DOT, for many passengers by undermining the principle that the Warsaw Convention provides the exclusive remedy.

First, airlines will likely see exposure to unlimited liability in the United States under federal and state laws, without regard to the Convention, as a breach of the understanding upon which the consensus to waive the liability limits was based. If allowed to stand, the decision below could disrupt that consensus and derail the ongoing implementation process.

Second, and equally disturbing, is the prospect that, if the Convention is not exclusive, foreign courts will be encouraged to declare particular claims to be outside the Convention's scope, subjecting passengers (including U.S.

citizens) to *less* favorable foreign law and depriving them of these new protections. In this regard, the term "accident" has been interpreted broadly in identifying those events for which compensation should be provided by airlines.[45] The Second Circuit, however, narrowly—and incorrectly—interpreted the term "accident" as referring only to those "catastrophic" events that were "within the contemplation of the drafters of the Convention." Pet. App. 20a. This precedent could lead to narrow definitions of the term "accident" in cases brought in foreign courts where national law is significantly less favorable to passengers than the Convention's rules.

## IV. PRESERVING THE CONVENTION'S EXCLUSIVITY WILL PROMOTE THE SECURITY OF AIRLINES AND PASSENGERS.

Security programs required of airlines by countries that have signed the Warsaw Convention, including the United States, involve a complex web of international agreements that are grounded on the view that the Warsaw Convention provides the exclusive recourse for injured passengers. Changing this exclusivity premise threatens to undermine these security measures.

Security with respect to international air transportation is pervasively governed by treaty. The overwhelming majority of the parties to the Warsaw Convention are also party to the 1944 Chicago Convention, the main purpose of which is to promote safety and order in international civil aviation.[46] Under Annex 17 to that Convention, signatory countries must establish and maintain effective measures to protect the security of international civil avia-

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[45] *Air France v. Saks*, 470 U.S. at 405 (an accident "arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger").

[46] Chicago Convention, *supra* n.27, Preamble, Art. 44. *See also* NICOLAS M. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 187 (1981).

tion.[47] To further develop a uniform security system, other international agreements to which the United States is party impose on signatory countries requirements designed to counter terrorist acts.[48]

Although the Chicago Convention and Annex 17 thereto recognize airline security as a sovereign police function, the United States has entrusted airlines with the bulk of that responsibility. Under U.S. law, the Federal Aviation Administrator sets screening standards and requires U.S. and foreign airlines to establish and implement security programs.[49]

The FAA has extensive regulations regarding the security measures that must be taken by airports,[50] airlines,[51] indirect air carriers (such as freight forwarders) that engage indirectly in air transportation of property,[52] and foreign airlines operating to and from the United States.[53] Airline security programs must be filed with, and approved by, the FAA.[54]

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[47] *See* ICAO, *International Standards and Recommended Practices, Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference*, Annex 17 to the Chicago Convention (6th ed. 1997).

[48] *See, e.g.*, Convention on Offenses and Certain Other Acts Committed on Board Aircraft, September 24, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, February 24, 1988, T.I.A.S. 7570, 27 I.L.M. 627.

[49] 49 U.S.C. §§ 44901-44915.

[50] 14 C.F.R. Part 107.

[51] 14 C.F.R. Part 108.

[52] 14 C.F.R. Part 109.

[53] 14 C.F.R. Part 129.

[54] 14 C.F.R. §§ 108.5, 108.7(a)(4).

Congress has also enacted legislation to assure that foreign airports provide safety and security to the flying public. Under Section 551 of the International Security Development and Cooperation Act,[55] DOT periodically assesses the effectiveness of security measures maintained at foreign airports through which U.S. travelers pass, applying ICAO standards.[56]

The elaborate system of international rules governing airline security upon which U.S. law is based was developed with a common understanding among nations that the Convention would exclusively govern airline liability. There has been no recognition that local tribunals can regulate, or otherwise impose liability upon, airlines for the normal implementation of these solemn obligations. "The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." [57]

The Second Circuit decision ignores this reliance and thus fails to appreciate the effects of its decision on international airline security. It is now well established that the Warsaw Convention governs an airline's liability to passengers for terrorist attacks, including hijacking.[58]

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[55] Pub. L. No. 99-83, § 551(a), 99 Stat. 190, 222-25 (1985).

[56] 49 U.S.C. § 44907(a)(2)(C).

[57] *United States v. Stuart*, 489 U.S. 353, 369 (1989); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *Factor v. Laubenheimer*, 290 U.S. 276, 294-295 (1933).

[58] *See Air France v. Saks*, 470 U.S. at 405; *see, e.g., Pflug v. Egyptair Corp.*, 961 F.2d 26 (2d Cir. 1992); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1269 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Margrave v. British Airways*, 643 F. Supp. 510 (S.D.N.Y. 1986); *Salerno v. Pan American World Airways, Inc.*, 606 F. Supp. 656 (S.D.N.Y. 1985).

Accordingly, U.S. courts have made clear that the Convention imposes "close to absolute liability" (Pet. App. 13a) for passenger injury and death arising from an airline's negligence in failing to conduct security searches.[59]

The Second Circuit's holding places airlines in an untenable situation. On the one hand, it subjects them to strict liability under the Convention for failing to conduct a search. On the other hand, it subjects them to potentially unlimited liability under state law for conducting such a search—even where, as here, the search conforms to procedures mandated by U.S. and international law. This result is not only unfair, but plainly inconsistent with the maintenance of an effective security program.

Moreover, the airline employees conducting these searches will no longer be able to rely on the Convention as circumscribing their liability.[60] The Second Circuit's decision adds an additional consideration into the mix of complex factors employees weigh in determining whether to search any particular passenger: whether the passenger is likely to sue for unlimited damages if the search does not disclose a weapon or explosive device. The decision thus not only defeats the Convention's purpose of unifying liability rules for airlines, but also threatens to compromise the security of airlines and passengers.

## V. THE COURT BELOW BASED ITS DECISION ON A FUNDAMENTAL MISCONSTRUCTION OF THE CONVENTION.

The lower court's reasoning misconstrues the scope of the Warsaw Convention, as applied by the courts of this country, and effectively rewrites Article 17. The court concluded that if personal injuries arising from mandated

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[59] *See, e.g., In re Air Disaster at Lockerbie, Scotland*, 37 F.3d 804, 811 (2d Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

[60] *See Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) (airline employees are indemnified by their employer for claims arising within the scope of their employment).

security measures were not actionable under state law without regard to the Convention, it would lead to "the absurd result of allowing carriers to escape liability for their negligence—or even their intentional torts—so long as the event giving rise to the injury was not an accident. . . ." [61] By incorrectly interpreting the meaning of the term "accident," [62] the court of appeals failed to recognize that if an airline conducts a security search in a negligent or intentionally tortious manner, that activity is certainly unexpected by the passenger and unusual for the airline. Such a search would thus be an "accident" covered by the Convention, and the passenger would have a remedy.[63]

The Convention's recently waived passenger liability limits had often been criticized as being wholly inadequate.[64] Nevertheless, there is nothing absurd about a treaty that precludes liability where no "accident" within its meaning can be found. This Court recognized in *TWA v. Franklin Mint* that rewriting the Convention's rules is not the province of the judiciary.[65]

The Warsaw Convention provides the exclusive basis for seeking a remedy for any personal injury incurred during international air transportation,[66] whether or not the event can be termed an "accident." [67] If an "accident" can be found from the facts (as the district court did

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[61] Pet. App. 20a.

[62] *See, supra* n.45 and accompanying text.

[63] *Air France v. Saks*, 470 U.S. at 405 (1985).

[64] *In re Korean Air Lines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987); Department of Transportation Order 96-10-7, 1996 DOT Av. LEXIS 640 (D.O.T. Oct. 3, 1996). *See supra* n.22.

[65] 466 U.S. 243 (1984).

[66] Warsaw Convention, Article 1.

[67] As noted (*supra* n.3), an airline is liable under Article 17 of the Convention for injuries sustained in the course of international air transportation that result from an "accident." *See Air France v. Saks*, 470 U.S. at 396.

here) and if the "accident" results in physical injury (which Respondent does not allege), then the Convention provides a remedy.

If, however, an "accident" cannot be found (as the court of appeals held), or if an "accident" is found to have occurred but there is no physical injury (as the district court found), then the Convention does not provide a remedy.[68] In all cases, however, the Convention's uniformity and exclusivity dictate that parties turn to the Convention—and the Convention alone—in seeking redress for personal injuries incurred in international air transportation.

## VI. THE U.K. HOUSE OF LORDS HAS ALSO FOUND THE CONVENTION TO BE EXCLUSIVE.

To further the Convention's purposes of uniformity and harmonization, treaty partners properly consider one another's views.[69] The decision below conflicts directly with the decision of the U.K. House of Lords in *Abnett v. British Airways*.[70] Affirmation of the decision below will make U.S. law inconsistent with the law applied by some of our largest aviation trading partners.

*Abnett* involved an international flight that arrived for refueling in Kuwait early on the morning of August 2, 1990, about five hours after Iraqi forces had begun to invade Kuwait. The passengers disembarked into the transit lounge to await departure. But while they were in the terminal, the Iraqis took them prisoner and they became "human shields." [71]

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[68] *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530; *Air France v. Saks*, 470 U.S. 392.

[69] *See Air France v. Saks*, 470 U.S. at 404.

[70] Pet. App. 34a-65a; *accord, Emery Air Freight Corp. v. Nerine Nurseries Ltd.* [1997] 3 NZLR 723.

[71] Pet. App. 38a.

Judith Abnett and the Sidhu family were among the passengers. Abnett sought relief in British courts for damage occasioned by delay under Article 19 of the Convention and at common law for breach of contract. The Sidhu family did not plead under the Convention at all since they filed their claim outside the two-year time limit allowed under Article 29 of the Convention. Instead, they based their claim on common-law negligence.

The House of Lords, in reviewing their appeals, carefully analyzed the Convention's text and *travaux preparatoires*, as well as this Court's decisions in *Air France v. Saks* and *Eastern Air Lines v. Floyd* and a French decision arising out of the same events.[72] Finding no assistance in U.S. authorities, Lord Hope writing for the panel found that Article 24's phrase "the cases covered by Article 17" extends "to all claims made by the passenger against the carrier arising out of international carriage by air" (other than delay and certain baggage claims).[73] The House of Lords dismissed the common-law claims and found the Sidhu's baggage claim time-barred.

Neither party had made a claim under Article 17, because the principal basis for each of their claims was psychological damage for which Article 17 gives no remedy.[74] The parties also apparently believed that there was no "accident" within the meaning of Article 17. They apparently did not argue that being taken hostage at the begin-

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[72] The Court distinguished a French decision arising out of the same events. Pet. App. 63a. In that case, the court of first instance found that the events did not occur in the course of disembarking (and hence in international air transportation) within the meaning of Article 17. The French court applied French law to allow plaintiffs damages unrestricted by Article 22. An intermediate French appellate court upheld the lower court's decision on November 12, 1996. *British Airways v. Mohamed*, No. 95-26736, Judgment at 11 (CA Paris, 1996).

[73] Pet. App. 55a.

[74] *See, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530.

ning of a war during an international journey was "an unexpected or unusual event external to the passenger," thereby meeting the *Air France v. Saks* test. Nonetheless, the House of Lords was somewhat concerned by the lack of a remedy:

> An answer to the question which leaves claimants without a remedy is not at first sight attractive. It is tempting to give way to the argument that where there is a wrong there must be a remedy. . . . Alongside these principles, however, there lies another great principle, which is that of freedom of contract. . . . [The Convention] was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. . . . *A balance was struck, in the interests of certainty and uniformity.*[75]

## CONCLUSION

For the foregoing reasons, the Court should uphold the exclusivity of the Convention and reverse the holding of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: July 16, 1998

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[75] Pet. App. 64a-65a.